IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1596

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, THE COMMONWEALTH OF VIRGINIA, AND THE TOWN OF WISE, VIRGINIA,
Appellants,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR.

On Appeal from the United States District Court For the Western District of Virginia

JURISDICTIONAL STATEMENT

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Appellants,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR.

On Appeal from the United States District Court For the Western District of Virginia

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JURISDICTIONAL STATEMENT

This is a cross-appeal brought by the Commonwealth of Virginia, the Town of Wise, Virginia, and the Virginia Surface Mining and Reclamation Association from a judgment of the District Court for the Western District of Virginia insofar as such judgment holds that the Commerce Clause of the United States Constitution empowers Congress to regulate the use of private non-federal lands within a State. The implications of such a holding raise powerful constitu-

tional questions which should be examined by this Court. Jurisdiction of this Court is invoked under 28 U.S.C. 1252.

OPINION BELOW

The Memorandum Opinion and Order of the district court, issued on January 3, 1980, together with the district court's supplemental memorandum and order dated January 21, 1980, are printed in the Appendix to the Jurisdictional Statement of Appellant, Secretary of the Interior, filed with this Court on April 1, 1980. Such Appendix is relied on for purposes of this Statement. The Commonwealth of Virginia, the Town of Wise, Virginia, and the Virginia Surface Mining and Reclamation Association filed a notice of appeal to this Court on February 11, 1980, with the Clerk of the District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth and Tenth Amendments to the Constitution of the United States, and the relevant provisions of the Federal Surface Mining Control and Reclamation Act of 1977, are printed in the Appendix to the Jurisdictional Statement of the Secretary of the Interior, and such Appendix is relied upon for the purpose of this Statement.

QUESTION PRESENTED

Whether the provisions of the Federal Surface Mining Control and Reclamation Act which interpose federal regulatory controls on the use of private nonfederal lands within a State constitute a valid exercise of the power of Congress under the Commerce Clause of the Constitution?

STATEMENT OF THE CASE

Cross-appellants herein, plaintiffs below, brought this action seeking a declaratory judgment that the provisions of title V of the Federal Surface Mining Control and Reclamation Act (hereinafter the Act) which establish a scheme of federal controls on the use of private non-federal lands within a State, and upon the exercise of individual rights in and to real property, are in excess of the power of Congress to regulate interstate commerce, and are not grounded upon any of the other enumerated powers granted to the federal government by the Constitution.

Although the district court found that certain sections of the Act unconstitutionally interfere with reserved State powers under the Tenth Amendment, as well as with property rights under the Fifth Amendment, the court in its January 3, 1980 Order ruled that: *"Title V of the Surface Mining Control and Reclamation Act is hereby declared to be a valid exercise of the power of Congress to regulate interstate commerce and is rationally based."* Appendix, p.18a. It is this portion of the court's judgment which is the subject of this cross-appeal.[1]

THE QUESTION IS SUBSTANTIAL

The Act in its major features establishes a preemptive program of federal regulatory controls respecting

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[1] The ruling of the district court relative to other issues raised by plaintiffs under the Fifth and Tenth Amendments is the subject of the appeal filed herein by the Secretary of the Interior. No. 79-1538. This Court has noted that where an appeal is filed under 28 USC 1252 Congress intended that "the whole case come up," and the Court has the power to pass on questions raised by a cross-appeal. *United States* v. *Raines*, 352 US 17 (1960).

land use and land reclamation, and thrusts the federal government for the first time into a sphere of regulatory activity which has heretofore been regarded as exclusively within the powers of the States and their political subdivisions.

The main thrust of the Act is directed at control of land use for surface coal mining, with particular emphasis upon the post-mining condition and utilization of land areas disturbed by surface coal mining, and bears only indirectly or peripherally upon the commerce aspects of surface coal mining. The regulatory scheme of the Act in its overall effect is to drastically restrict (and in substantial part prohibit) the beneficial use of land and recovery of mineral resources vital to the economic and social well-being of the local communities and people in many coal producing regions, particularly those situated in the State of Virginia.

In contrast to other federal mining legislation, such as the Federal Mine Safety and Health Act of 1977[2] which deals with the safety and health of miners employed in production of coal and other minerals for interstate commerce, the Surface Mining Act is directed not to the "commerce" aspects of surface mining, i.e. the operations involved in extraction, transportation and sale of surface mined coal, but deals entirely with aspects of land use. By imposing federal controls upon land use for surface mining, and dictating criteria for reclamation of land areas after active mining has ceased, Congress has in effect transferred to a federal agency the traditional authority of State and local governments in respect to these functions, and has created a comprehensive body of federal police

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[2] 30 USC 801 *et seq.*

powers designed to supplant the inherent police powers of State and local governments to provide for the protection of the individual citizen in his person as well as in his property rights. It is in this context that valid questions are presented as to whether the Act constitutes a genuine exercise of the commerce power, or whether the commerce power is simply a cloak for assumption of federal control of land use functions and police powers not heretofore recognized as within the authority of the government under the Commerce Clause.

Regulation of private land use has been consistently held to be within the inherent police powers of the States and the counties, cities and towns which comprise their political subdivisions. *City of Euclid* v. *Ambler Realty Co.,* 272 US 365 (1926); *Berman* v. *Parker,* 348 US 26 (1954); *Village of Belle Terre* v. *Boraas,* 416 US 1 (1974); *Penn Central Transportation Co.* v. *New York City,* 438 US 104 (1978); *Construction Industry Assn.* v. *City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), cert. den. 424 US 934; *West Brothers Brick Co.* v. *Alexandria,* 169 VA. 271 (1937). Similarly, the power to authorize or restrict mining operations on lands within a State has heretofore been exercised exclusively by the States, counties and municipalities, and their designated agencies. See, e.g. *Midland Electric Coal Corp.* v. *Knox County,* 1 Ill. 2d 200, 115 N.E. 2d 275 (1953); *Appeal of Mutual Supply Co.,* 366 Pa. 424, 77 A.2d 612 (1951); *Kane* v. *Kreiter,* 25 Ohio 2d 295, 143 N.E. 2d 829 (1963). See also, 10 ALR 3d 1226, and cases there cited. The federal government has not, prior to this Act, claimed any supervening authority in this area.

It is undeniable that coal is a commodity which moves in interstate and foreign commerce, and is subject to regulation by Congress under the Commerce Clause. The issue here, however, is not simply a question of regulation of a commodity which moves in interstate commerce, but whether the power to regulate commerce carries with it the power to regulate the real estate incident to production of such commodity.

This question was long ago dealt with by this Court in *McCready* v. *Virginia,* 94 U.S. 391 (1877), in which the Court noted that "Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade." 94 U.S. at 396. This comment from the *McCready* case has recently been cited with approval by the Court of Appeals for the Fourth Circuit in *Moore* v. *Hampton Roads Sanitation Commission,* 557 F.2d 1030, 1038 (1977). Indeed, this Court has never held, nor even intimated, that land as such is subject to regulation under the Commerce Clause. In the relatively few cases in which the subject has been even touched upon the Court's language unmistakably recognizes the primacy and sovereignty of the States in this area. *Geer* v. *Connecticut,* 161 U.S. 793 (1896); *Kansas* v. *Colorado,* 206 U.S. 46 (1906); *United States* v. *Arizona,* 295 U.S. 174 (1935); *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955); *Kleppe* v. *New Mexico,* 426 U.S. 529 (1976). In *Gage* v. *Atomic Energy Comm.,* 479 F.2d 1214 (D.C. Cir. 1973), the Court of Appeals for the District of Columbia Circuit held that were the Atomic Energy Commission to attempt to bar land acquisition by a utility company for construction of a nuclear power plant the question would be presented as to whether such action "impermis-

sibly interfered with traditional state powers over land use and utility land acquisition, or unconstitutionally preempted private rights of free alienation." 479 F.2d at 1220.

Diligent research reveals absolutely no judicial authority or precedent holding that the mere fact that the fruits of the land move in interstate commerce gives rise to federal regulatory powers under the Commerce Clause to dictate the uses of private lands within the jurisdiction of the several States.

CONCLUSION

The question presented here has enormous constitutional implications. If the Commerce Clause gives the federal government the power to regulate land use within the States there are no foreseeable limits upon the ultimate reach of that power. In a real sense this case presents the ultimate test of the principles of Federalism, and for this reason the Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civ. No. 78-0224-B

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC. ET AL.,

Plaintiffs,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

AND

VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., ET AL.,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed February 11, 1980

Notice is hereby given that the Commonwealth of Virginia, the Town of Wise, and the Virginia Surface Mining and Reclamation Association, plaintiffs in this case, appeal to the Supreme Court of the United States from the order and judgment entered in this action on January 3, 1980, as supplemental and modified by order dated January 21, 1980.

This appeal is taken pursuant to 28 U.S.C. 1252 and 2101.

Respectfully submitted,

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February 8, 1980